Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-425

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES W. NORTON AND RUBY W. NORTON: CHARLES W. AND RUBY W. NORTON, INC., AN IOWA CORPORATION; INVESTMENT SECURITIES COMPANY, AN IOWA CORPORATION; WM. B. NORTON, INDIVIDUALLY AND AS CUSTODIAN FOR BRADLEY L. NORTON; FLORENCE N. BATES AND LESLIE W. BATES; LUCILLE YEDLIK AND EDWIN G. YEDLIK; CHARLES WESLEY NORTON AND MACINE N. NORTON; CARL J. MEALY AND ALICE N. MEALY; HAROLD D. NORTON AND BRENDA S. NORTON; MIRIAM B. BAUMANN AND ROBERT W. BAUMANN,
Petitioners,

v.

LEADVILLE CORPORATION, A COLORADO CORPORATION,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. A-159

CHARLES W. NORTON AND RUBY W. NORTON; CHARLES W. AND RUBY W. NORTON, INC., AN IOWA CORPORATION; INVESTMENT SECURITIES COMPANY, AN IOWA CORPORATION; WM. B. NORTON, INDIVIDUALLY AND AS CUSTODIAN FOR BRADLEY L. NORTON; FLORENCE N. BATES AND LESLIE W. BATES; LUCILLE YEDLIK AND EDWIN G. YEDLIK; CHARLES WESLEY NORTON AND MACINE M. NORTON; CARL J. MEALY AND ALICE N. MEALY; HAROLD D. NORTON AND BRENDA S. NORTON; MIRIAM N. BAUMANN AND ROBERT W. BAUMANN,
Petitioners,

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LEADVILLE CORPORATION, A COLORADO CORPORATION,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioners have prayed that Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered May 19, 1980.

CITATION TO OPINION BELOW

The Petition seeks review of the Colorado Supreme Court decision in the case of *Charles W. Norton, et al. v. Leadville Corporation,* No. 80 SC 91, denying Petitioners' Petition for Writ of Certiorari and affirming the decision and order denying Petitioners' Motion for Correction and Modification of the Record of the Colorado Court of Appeals, No. 78-714.

STATEMENT OF JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 19, 1980. Petitioners contend that jurisdiction to review this judgment by Writ of Certiorari is conferred on this Court by Title 28, United States Code, Section 1257(3). Respondent denies that this Court has jurisdiction pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED BY PETITIONERS

Whether the Colorado Appeals Court denied Petitioners' rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution by considering and basing their decisions on evidence *alledgedly* improperly included in the record on appeal. (emphasis supplied)

CONSTITUTIONAL PROVISIONS INVOLVED
(As States by Petitioners)

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services, in time of war or public danger; nor shall any person be subject for the

same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV

§1. Citizenship defined—privileges of citizens—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners herein are stockholders in the Respondent corporation. In September, 1974, Respondent Corporation entered into an agreement with a company known as Day Mines, Inc. whereby the working interest in the mining properties held by Respondent Corporation would be leased to Day Mines for a term of twenty-five years. In or about January, 1975, the Petitioners as shareholders of Respondent Corporation, were sent proxy materials notifying them of a special meeting called for the purpose of approving the agreement with Day Mines. The proxy material contained information concerning the rights of dissenting shareholders, and state, *inter alia,* as follows:

> If within such 30 day period such dissenting stockholders and Leadville fail to agree upon a fair value of shares, such dissenting stockholder may, within 60 days

after the expiration of the 30 day period, file a petition in any court of competent jurisdiction in Lake County, Colorado, asking for a finding in determination of the fair market value of his shares.

At the special meeting held on February 7, 1975, the shareholders of Respondent Corporation ratified the Day Mines lease agreement. Petitioners were the only shareholders to dissent.

Petitioners, as dissenting shareholders, then proceeded to institute a statutory stock appraisal action on May 5, 1975, in the District Court in and for Lake County in accordance with Section 7-5-113, Colorado Revised Statutes, 1973, which specifies that venue for such action is to be in a court of competent jurisdiction in the county where the registered office of the corporation is located on the date the action is commenced.

After commencing this statutory appraisal action, Petitioners moved to dismiss the statutory appraisal action on the ground that the Lake County District Court lacked jurisdiction over the subject matter of such action under Section 7-5-113 of the Colorado Revised Statutes, 1973, or, in the alternative for change of venue. The trial court denied these motions.

At trial of this matter held on April 20, 1978, discussion was had concerning the Petitioners' Motion to Dismiss and counsel for Petitioners tendered to the court a Certificate from the Colorado Secretary of State reflecting the status of Respondent Corporation's registered office and agent. The Certificate indicated that there was filed in the office of the Secretary of State of the State of Colorado on May 12, 1975 a Statement of Change of Registered Office or Registered Agent by the Respondent changing the registered office from P.O. Box 960, Leadville, Colorado to 1677 Wadsworth, Lakewood, Colorado 80215. The same Certificate had previously been tendered the trial court on December 20, 1977 when said court previously

denied Petitioners' Motion to Dismiss and in the alternative to change the venue.

On May 2, 1978, the trial court entered its judgment valuing the Petitioners' shares in Respondent Corporation at $16,173.10 together with interest thereon from February 6, 1975. Petitioners appealed such judgment to the Colorado Court of Appeals challenging the trial court's subject matter jurisdiction over such action on the basis of the venue jurisdictional provisions of Section 7-5113, Colorado Revised Statutes, 1973.

On or about September 28, 1978, the Clerk of the Lake County District Court certified and transmitted and record to the Colorado Court of Appeals. After conclusion of pleading by the parties, the Court of Appeals announced its judgment on December 28, 1979, affirming the trial court and finding that the Lake County District Court properly asserted subject matter jurisdiction over the action.

Counsel for Petitioners filed a Motion for Correction and Modification of the Record on March 24, 1980 pursuant to Rule 10(e) of the Colorado Appellato Rules. Petitioners' Motion for Correction and Modification of the Record specifically sought exclusion of the Certificate of the Secretary of State dated December 27, 1977 on the grounds that such exhibit was erroneously included in the record as an exhibit attached to Petitioners' Motion to Dismiss. Petitioners further alleged that such error by the Clerk was substantially detrimental to their cause. Petitioners do not controvert the facts stated in said Certificate. Petitioners further sought modification of the record to include certain documents erroneously and mistakenly omitted by prior counsel. Such Motion was denied by the Court of Appeals on March 26, 1980.

Petitioners sought review of the Court of Appeals judgment and denial of their Motion for Correction and Modification of the Record by way of a Petition for Writ of

Certiorari filed with the Colorado Supreme Court on March 24, 1980. Such Petition was denied on May 19, 1980. Thereafter, Petitioners requested an extension of time from this court to file their Petition for Writ of Certiorari, which extension was granted to and including September 15, 1980.

REASONS FOR DENIAL OF THE WRIT

PETITIONERS HAVE ERRONEOUSLY REPRESENTED TO THIS COURT THE STATUS OF THE RECORD IN THE LOWER COURT PROCEEDINGS. THE DOCUMENT, i.e., CERTIFICATE OF THE SECRETARY OF STATE OF THE STATE OF COLORADO REGARDING THE REGISTERED OFFICE OF LEADVILLE CORPORATION, FILED MAY 12, 1975, WAS PROPERLY ADMITTED AND CONSIDERED IN THE COURSE OF ALL PREVIOUS TRIAL AND APPELLATE PROCEEDINGS.

The Document in Issue, the Certificate of the Secretary of State of Colorado regarding the Registered Office and Registered Agent of the Respondent, Leadville Corporation, filed May 12, 1975, is attached hereto as Exhibit "A".

First. Petitioners do not deny that the document, (Exhibit "A"), in correct and that the same was duly filed with the Secretary of State of the State of Colorado on May 12, 1975 nor do the Petitioners contend that Exhibit "A" is not prima facie evidence of all the facts therein stated:

> 7-3-117 C.R.S. 1973. Certificates and certified copies to be received in evidence. All certificates issued by the secretary of state in accordance with the provisions of this code and all copies of documents filed in his office in accordance with the provisions of this code when certified by him shall be received in all courts, public offices, and official bodies as prima facile evidence of the facts therein stated. A certificate by the secretary of state under the

> great seal of this state as to the existence or nonexistence of the facts relating to corporations which would not appear from a certified copy of any of the foregoing documents or certificates shall be received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

Second, Further the Petitioners do not question that the applicable law in Colorado governing the change of registered office and registered agent is as found in 7-3-111(2), C.R.S. 1973 quoted as follows:

> (2) Such statement shall be executed by the corporation by its president or a vide-president, verified by him, and delivered to the secretary of state. If the secretary of state finds that the statement conforms to the provisions of this code, he shall file the statement in his office, *and, upon such filing, the change of address of the registered office, the appointment of a new registered agent, or both, as the case may be, shall become effective.* (emphasis added)

Nor do the Petitioners contend that pursuant to the above Colorado statute that the registered office of Leadville Corporation at the date the Petitioners filed their proceeding was in Lake County where the Petitioners correctly institute their stock appraisal action.

Third, nor do the Petitioners contend that pursuant to Colorado statutes and case law that the registered office of the Respondent, Leadville Corporation, was in any other county other than Lake County nor do Petitioners contend that venue in the within entitled action is not jurisdictional.

Fourth, it is the apparent contention of the Petitioners that because the Colorado Court of Appeals followed Colorado law and found that the Registered Office of the Respondent to be in Lake County and, thus, jurisdiction for the shareholders' action to be in such county that Certiorari should be granted because the record as examined by counsel for the Petitioners does not

properly reflect the admission into evidence of Exhibit "A" which shows that the Registered Office of the Respondent was not changed from Lake County until seven days after the initiation of this action by the Petitioners.

Contrary to the representations made by the Petitioners in their Petition for Writ of Certiorari Exhibit "A", filed May 12, 1975, duly certified to by the Secretary of State of the State of Colorado, was properly tendered for introduction into evidence to the trial court, without objection by Petitioners, at a hearing held in Eagle, Colorado on December 20, 1977. The hearing held December 20, 1977 was on one of the previous motions of Petitioners to dismiss the proceeding and/or in the alternative move for a change in venue. Exhibit "A" was properly admitted into evidence at this hearing and was properly considered at that time by the trial court. See trial court's Minute Order of December 20, 1977 (Exhibit "B"), attached hereto and incorporated herein by this reference.

The Certificate referred to on Page 6 of the Petitioners' brief dated December 27, 1977 is one and the same document that is attached as Exhibit "A" and was duly admitted into evidence and considered by the trial court at the hearing held December 20, 1977. As the Petitioners pointed out on Page 5 of their Petition the court noted that it already had a copy of Exhibit "A" in the file and that it considered the filing of an additional copy as superfluous as the trial court had already considered the same. It is well settled that a court will take judicial notice of its own records in the immediate case or proceedings before it and of all matters patent on the face of such records, including all prior proceedings in the same case. 29 *Am. Jur. 2nd* 89.

It is furhter a general rule of law that an appellate court may take judicial notice and an order made in the case by the court below, which is a matter of record in that court, even though it does not appear in the record on appeal. 4 *Am. Jur. 2nd* 934.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 13th day of October, 1980.

COSGRIFF, DUNN & FRENCH

By _____

PETER COSGRIFF
P.O. Box 11
Leadville, Colorado 80461
Telephone: (303) 486-1885
Attorneys for Respondent

CERTIFICATE OF MAILING

I hereby certify that on this 13th day of October, 1980 a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of the State of Colorado by placing the same in the United States mail, postage prepaid first class, and properly address to the following parties.

ARTHUR M. SCHWARTZ, P.C.
The Market Center
1650 Market Street
Denver, Colorado 80202

PETER CONGRIFF

EXHIBIT A

Form DPI (REV. 3-70)

FILED in the office of the Secretary of State of the State of Colorado

MAY 12 1975

296826

371

STATEMENT OF CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT, OR BOTH, OF

LEADVILLE CORPORATION

To The Secretary of State
of the State of Colorado

Pursuant to the provisions of the Colorado Corporation Act, the undersigned corporation, organized under the laws of the State of Colorado submits the following statement for the purpose of changing its registered office or its registered agent, or both, in the State of Colorado:

First: The name of the corporation is Leadville Corporation

Second: The address of its previous REGISTERED OFFICE was P.O. Box 960, Leadville, Colorado

Third: The address to which its REGISTERED OFFICE is to be changed is 1677 Wadsworth, Lakewood, Colorado 80215

Fourth: The name of its previous REGISTERED AGENT was Rudie Schaffer

Fifth: The name of its successor REGISTERED AGENT is Robert Knecht

Sixth: The address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

Seventh: The address of its place of business in Colorado is 1677 Wadsworth, Lakewood, Colorado 80215

Dated April 24, 19 75.

Leadville Corporation (Note 1)

By Robert A. Knecht (Note 2)
Its Vice President

STATE OF Colorado
County of JEFFERSON

Before me, ROBERT P. LATHAM, a Notary Public in and for the said County and State, personally appeared Robert A. Knecht who acknowledged before me that he is the Vice-President (President) (Vice-President) of Leadville Corporation, a Colorado (State of Incorporation) corporation, that he signed the foregoing, and that the statements contained therein are true.

In witness whereof I have hereunto set my hand and seal this 30 day of April, A. D. 19 75.

My commission expires JUNE 6TH, 1976

Robert P. Latham
Notary Public

NOTES: 1. Exact corporate name of corporation making the statement.
2. Signature and title of officer signing for the corporation,—must be President or Vice-President
3. Signature of Notary Public must be exactly as shown on Notarial Seal, and must agree with notarial commission.

Filing fee $5.00

DEFENDANT'S EXHIBIT
2 #9514

EXHIBIT A

STATE OF COLORADO
DEPARTMENT OF
STATE

I hereby certify that this is a true and complete copy of the document as filed in this office and admitted to record in File No. 2966826

DATED: 12-15-1922

Mary Estill Buchanan

Secretary of State

BY Barbara Lage

EXHIBIT B

IN THE DISTRICT COURT IN AND FOR

THE COUNTY OF EAGLE LAKE

AND STATE OF COLORADO

Action No. 8514

Charles W. Norton et al

Plaintiff,

vs

Leadville Corporation

Defendant

MINUTE
ORDER OF COURT

Wm. L. JOnes, Judge
Meleesa Reichert, Court Report
Wanda Schmidt, Clerk

BE IT REMEMBERED, That heretofore and on to wit, the 20th day of December, A. D. 19 77, the same being one of the regular juridical days of the December, A. D. 19 77 Term of Court, the following proceedings, inter alia, were had and entered of record in said Court, to wit:

This matter coming on for Hearing on Motions-- Joseph Fattor appeared as counsel for the Pl. Peter Cosgriff appeared as counsel for the Def. Pl. Ex. "B" offered and admitted by the Court. Def. Ex. 1 and 2 marked for ident., offered and admitted. Motion by Mr. Fattor to Dismiss and Motion for Change of Venue. Mr. Cosgriff responds and argues Motions. Mr. Fattor reiterates further. Court finds that registered office was in Leadville at time of filing. Court denies both Motions. Court will not vacate trial setting at this time.

The above Motions heard at the District Court at Eagle, Colorado.

EXHIBIT B